A

MALAYSIAN BUNKERS SYSTEM SDN BHD

v.

ZAINAL FIKRI HJ AHMAD & ANOR

B

COURT OF APPEAL, PUTRAJAYA
MOHD GHAZALI YUSOFF JCA
ZULKEFLI MAKINUDIN JCA
LOW HOP BING JCA
[CIVIL APPEAL NO: J-02-105-06]

C

19 DECEMBER 2007

CIVIL PROCEDURE: *Appeal - Leave to appeal - Order of High Court related to costs - Whether leave of Court of Appeal required - Exceptions to general rule - Courts of Judicature Act 1964, s. 68(1)(c)*

D

CIVIL PROCEDURE: *Costs - Appeal - Order of High Court related to costs - Whether leave of Court of Appeal required - Exceptions to general rule - Courts of Judicature Act 1964, s. 68(1)(c)*

The High Court, on 11 November 2005, allowed a petition filed
E by the petitioners, practising as advocates and solicitors ('solicitors'), under s. 126(1) of the Legal Profession Act 1976. The High Court ordered the solicitor's bills of costs 114/2005 to 120/2005, all dated 20 April 2005, to be referred to the deputy registrar for taxation on a solicitor-client basis. The High Court
F also made a charging order on the taxed costs. This was the appellant's appeal against the two orders. The solicitors raised a preliminary objection on the ground that the High Court's decision related to the issue of costs only and so, under s. 68(1)(c) of the Courts of Judicature Act 1964 ('Act'), leave of the Court of
G Appeal was required. In the absence of such leave, this appeal was fundamentally defective and incompetent.

Held (dismissing the preliminary objection)
Per Low Hop Bing JCA delivering the judgment of the court:

H

(1) The appeal herein against the two orders involved questions of law and principle or, alternatively, the issue of costs constituted part and parcel of the larger appeal pertaining to these two orders. The client's appeal in any event concerns a
I genuine complaint, not only about costs, but also about other matters such as the charging order. Hence, this court had full jurisdiction to deal with both the costs and the other matter

pertaining to the charging order. In the circumstances, there was no substance in the solicitor's preliminary objection based on s. 68(1)(c) of the Act and no leave of this court was required. This appeal should be heard and determined on its merits. (paras 25 & 26)

Bahasa Malaysia *Translation Of Headnotes*

Mahkamah Tinggi, pada 11 November 2005, membenarkan petisyen yang difailkan oleh pempetisyen-pempetisyen, yang beramal sebagai peguambela dan peguamcara ('peguamcara-peguamcara'), di bawah s. 126(1) Akta Profesion Undang-Undang 1976. Mahkamah Tinggi memerintahkan supaya bil kos peguamcara 114/2005 hingga 120/2005, kesemuanya bertarikh 20 April 2005, dirujuk kepada timbalan pendaftar untuk taksiran mengikut asas peguamcara-pelanggan. Mahkamah Tinggi juga membuat satu perintah bayaran atas kos yang ditaksir. Ini adalah rayuan perayu terhadap kedua-dua perintah. Peguamcara-peguamcara membangkitkan bantahan awal atas alasan bahawa keputusan Mahkamah Tinggi hanya berkaitan dengan isu kos dan kerana itu, di bawah s. 68(1)(c) Akta Mahkamah Kehakiman 1964 ('Akta'), kebenaran Mahkamah Rayuan adalah diperlukan. Dalam ketiadaan kebenaran sedemikian, rayuan ini adalah secara pentingnya cacat dan tidak berkompeten.

Diputuskan (menolak bantahan awal)
Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

(1) Rayuan terhadap dua perintah di sini yang melibatkan persoalan undang-undang dan prinsip, atau secara alternatifnya isu kos, adalah sebahagian dari rayuan yang lebih menyeluruh yang menyentuhi kedua-dua perintah berkenaan. Apapun, rayuan pelanggan adalah rungutan yang tulen, tidak sahaja mengenai kos, tetapi menyentuhi perkara-perkara lain seperti perintah bayaran. Oleh itu, mahkamah ini mempunyai bidangkuasa penuh untuk menangani kedua-dua soal kos dan lain-lain perkara yang menyangkuti perintah bayaran. Dengan yang demikian, tiada asas pada bantahan awal peguamcara-peguamcara berdasarkan s. 68(1)(c) Akta dan kebenaran mahkamah ini adalah tidak perlu. Rayuan harus didengar dan diputuskan di atas merit.

Case(s) referred to:
Anthony Lucas v. The Malayan Cultures Co Ltd [1933] 1 LNS 5 HC ***(refd)***
Crystall v. Crystall [1963] 2 All ER 330 ***(refd)***
In Re The Rio Grande etc. [1877] 5 CD ***(refd)***
Vijayalakshmi Devi Nadchatiram v. Mahadevi Nadchatiram [2006] 4 CLJ 103 CA ***(refd)***
Wheeler v. Somerfield & Others [1966] 2 All ER 305 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 68(1)(c)
Johore Courts Enactment No 17 of 1920, s. 17(c)
Legal Profession Act 1976, s. 126(1)

Supreme Court of Judicature (Consolidation) Act 1925 [UK], s. 31(1)(h)

For the appellant - Sivarasa Rasiah; M/s Daim & Gamany
For the respondents - Badrol Hisham Mohd Sani; M/s Zainal & Badrol

[Appeal from High Court, Johor Bahru; Petition No: 26-8-2005(4)]

Reported by Suresh Nathan

JUDGMENT

Low Hop Bing JCA:

Appeal

[1] On 11 November 2005, the learned judicial commissioner of the Johor Bahru High Court ("the High Court") allowed the petition in encl (2) filed under s. 126(1) of the Legal Profession Act 1976 by the petitioners, practising as advocates and solicitors ("the solicitors").

[2] The High Court ordered the solicitors' bills of costs 114/2005 to 120/2005, all dated 20 April 2005, to be referred to the deputy registrar for taxation on a solicitor-client basis ("taxation order"). The High Court also made a charging order on the taxed costs ("charging order"). (The taxation order and the charging order shall collectively be referred to as "the two orders".)

[3] This is the appeal by the appellant, Malaysian Bunkers System Sdn. Bhd ("the client") against the two orders.

[4] In this judgment, the words "solicitor" and "solicitors" are used interchangeably; and a reference to a section is a reference to that section in the Legal Profession Act 1976 unless otherwise stated.

Factual Background

[5] In 1993, the client appointed Messrs Abdul Razak Ahmad & Associates ("the former solicitors") to handle two civil matters against Destination Marine Services Sdn. Bhd ("Marine Services") to recover monies due to the client. The two civil matters are:

(1) Johor Bahru High Court Civil Suit No: 22-68-93 to recover a sum of RM491,652.81 ("the High Court suit"); and

(2) Johor Bahru High Court Civil Suit No: 22-67-93 to recover a sum of RM13,212.32. This matter was subsequently transferred to the Johor Bahru Sessions Court ("the sessions court suit").

[6] The client alleged that:

(1) Sometime in November 1997, the solicitors through solicitor Badrol Hisham bin Mohd Sani agreed to take over the two civil matters from the former solicitors at a fee of RM10,000. This agreement was said to have been documented by the client's company resolution No: 33/97 dated 10 November 1997 ("the resolution") stating that the said fee was for all work, to be paid upon a positive and final outcome; and

(2) The solicitor had acknowledged receipt of a copy of this resolution, the cause papers and other documents when the client's "director", one Encik Johari bin Abdullah, personally handed them to the solicitor at his office on 18 November 1997.

[7] The solicitor however denied having received a copy of the resolution, which he alleged was subsequently added to the acknowledgment of receipt of the cause papers and other documents.

[8] The sessions court suit was dismissed with costs on 11 June 2002. On behalf of the client, the solicitor filed an appeal against that decision to the Johor Bahru High Court *vide* MT4-12-109-02. However, a settlement was reached between the parties and the appeal was later withdrawn by the client.

[9] In 1999, the High Court suit was dismissed with costs on 29 October 2001. On behalf of the client, the solicitor appealed to the Court of Appeal *vide* Civil Appeal No: J-02-1052-01 on 21 November 2001. The Court of Appeal allowed the appeal on 28 April 2004 and Marine Services was ordered to pay to the client RM514,673.61 with interest and costs.

[10] Marine Services then filed an application for leave to appeal against the Court of Appeal decision on 28 April 2004 to the Federal Court *vide* Civil Application No: 08-59-2004 (J). However, the client and Marine Services then resolved the matter amicably and consent judgment was recorded in the Federal Court on 17 January 2005 in the presence of the solicitor, whereby Marine Services consented to pay the client RM800,000 by way of 13 post-dated cheques.

[11] The client alleged that the solicitor did not at any time, since taking over conduct of the two civil matters in all the courts, request orally nor in writing for any further payment of fees.

[12] The client alleged that when the client paid the RM10,000 to the solicitor on 29 September 2004, the solicitor did not request for any further fee, except that the cheque for the RM10,000 be paid in his name instead of the firm of solicitors. He acknowledged receipt of the cheque.

[13] Eight months later, on 28 June 2005, the client received the solicitors' petition to tax the costs on a solicitor-client basis.

[14] The solicitor claims that he had delivered the bills of costs by post while the client alleged having seen the bills of costs for the first time only on 28 June 2005, when the bills were attached to the petition served on the client.

Preliminary Objection

[15] Mr. Badrol Hisham bin Mohd. Sani, learned counsel for the solicitors, raised a preliminary objection on the ground that the decision of the High Court relates to the issue of costs only and so under s. 68(1)(c) of the Courts of Judicature Act 1964, leave of the Court of Appeal is required. In the absence of such leave, this appeal is fundamentally defective and incompetent, relying on *Vijayalakshmi Devi Nadchatiram v. Mahadevi Nadchatiram* [2006] 4 CLJ 103.

[16] Mr. Sivarasa Rasiah, the client's learned counsel, responded that no leave is required.

[17] The above preliminary objection raises the question of whether the two orders come within the ambit of s. 68(1)(c) which, where relevant, reads:

> **68. Non-appealable matters.**
>
> (1) No appeal shall be brought to the Court of Appeal in – (c) where the judgment or order relates to costs only, which by law are left to the discretion of the Court, except with the leave of the Court of Appeal.

[18] Section 68(1)(c) and other equipollent provisions have been judicially considered in a number of instances.

[19] In *Anthony Lucas v. The Malayan Cultures Co. Ltd* [1933] MLJ 21, the plaintiff, a pauper, successfully sued the defendant company for $1,251.08, with costs to be taxed on the Supreme Court scale. The taxed costs amounted to $2,129.08, inclusive of "profit costs". On a review of taxed costs, the High Court held that "profit costs" could not be recovered in a "pauper action." On appeal, a preliminary objection was taken that it being concerned with the question of costs, the appeal was not competent under s. 17(c) of the then Johore Courts Enactment No. 17 of 1920. Murison CJ presiding in the then Court of Appeal considered s. 17(c) and dismissed the preliminary objection, as the appeal involved a question of law and principle, in which case an appeal does lie: see also *In Re The Rio Grande etc.* [1877] 5 CD at p. 284 per James LJ.

[20] Section 31(1)(h) of the English Supreme Court of Judicature (Consolidation) Act 1925 was an equipollent provision of s. 68(1)(c) which, where relevant, read:

> (1) No appeal shall lie … (h) without the leave of the court or judge making the order, from an order of the High Court or any judge thereof made … as to costs only which by law are left to the discretion of the court.

[21] Section 31(1)(h) was examined by the Court of Appeal in *Crystall v. Crystall* [1963] 2 All ER 330. Willmer LJ held that the husband's appeal, in so far as it related to costs, was only part of the larger appeal against the order which allowed the wife's claim

for the proceeds from the sale of the matrimonial home, and so the appeal was competent. It was not an appeal relating to costs only.

[22] Section 31(1)(h) was also discussed by the Court of Appeal in *Wheeler v. Somerfield & Others* [1966] 2 All ER 305. Lord Denning MR explained that under this section, if a person made no complaint against the judgment below, except about the order for costs, then he must obtain leave of the trial judge before he could come to the Court of Appeal. If he made a genuine complaint, however, not only about the costs, but also about other matters, then he can appeal both on those other matters and also on the costs; and the court has full jurisdiction to deal with them. Even if he failed on the other matters, the Court of Appeal has jurisdiction to deal with the costs.

[23] In *Vijayalakshmi Devi Nadchatiram v. Mahadevi Nadchatiram* [2006] 4 CLJ 103, our Court of Appeal discovered that the essence of the appellant's application in encl (256) was for the revocation of the registrar's order made solely on the issue of costs. That was the true character of the matter under appeal. The appellant's attempt to convince the Court of Appeal that the order of costs involved law and principle and that it was part of a larger appeal were all rejected as a smoke screen to hide the true character of the appeal. The preliminary objection based on the incompetency of the appeal pursuant to s. 68(1)(c) was sustained by the Court of Appeal, speaking through James Foong JCA, and the appeal was dismissed.

[24] For purposes of completeness, pursuant to s. 68(1)(c) or equipollent provisions, the principles enunciated in the above authorities may be stated as follows:

(1) As a general rule, no appeal shall be brought to the Court of Appeal where the judgment or order relates to costs only, which by law are left to the discretion of the court, except with the leave of the Court of Appeal.

(2) By way of exceptions, s. 68(1)(c) would admit an appeal:

(a) where the appeal involves a question of law and principle;

(b) where the appeal in relation to costs is only part of a larger appeal against the order which allows the claim ie, where the appeal was not in relation to costs only; or

(c) where the appeal concerns a genuine complaint, not only about costs, but also about other matters, in which case the court has full jurisdiction to deal with both the costs and other matters, and even if the appeal fails on other matters, the Court of Appeal has jurisdiction to deal with costs.

(3) In determining whether an appeal comes within s. 68(1)(c), the Court of Appeal must look at the true character of the matter under appeal and must reject any smoke screen to hide the true character of the appeal.

[25] Reverting to the preliminary objection, I am of the view that the appeal herein against the two orders involves questions of law and principle, or alternatively the issue of costs constitutes part and parcel of the larger appeal pertaining to these two orders. The client's appeal in any event concerns a genuine complaint, not only about costs but also about other matters such as the charging order. Hence, this court has full jurisdiction to deal with both the costs and the other matter pertaining to charging order.

Conclusion

[26] In the circumstances, I am unable to find any substance in the solicitor's preliminary objection based on s. 68(1)(c) and hold that no leave of this court is required. This appeal should be heard and determined on merits. Costs in the cause.

[27] My learned brothers, Mohd Ghazali bin Mohd Yusoff, JCA and Zulkefli bin Ahmad Makinudin, JCA (now FCJ) have read this judgment in draft and have expressed their agreement with it as the judgment of the court.